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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 32

THE HONORABLE JAMES B. PARSONS, Judge of the United States District Court for the Northern District of Illinois, Eastern Division,

Petitioner,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 573

THE HONORABLE JAMES B. PARSONS, Judge of the United States District Court for the Northern District of Illinois, Eastern Division,

Petitioner,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENT

OPINION BELOW AND JURISDICTION.

The statements in the Brief for Petitioner are satisfactory.

STATUTES INVOLVED.

In addition to the statutes set forth in the Brief for Petitioner the following are pertinent:

FED. R. CIV. P. 41 (a) (1)
62 Stat. 882 (1948), 68 Stat. 11 (1954), 75 Stat. 83 (1961), as amended, 28 U.S.C. §102 (b)(1).
62 Stat. 895 (1948) 28 U.S.C. §132 (a).
62 Stat. 897 (1948), 28 U.S.C. §141.
62 Stat. 898 (1948), 76 Stat. 762, as amended, 28 U.S.C. §142.
62 Stat. 939 (1948), 28 U.S.C. §1445 (a).
62 Stat. 944 (1948), 63 Stat. 102 (1949), as amended, 28 U. S. C. §1651 (a).
ILL. REV. STAT. ch. 110, §77 (1961)

The pertinent text of these statutes is set forth in the appendix to this brief.

QUESTIONS PRESENTED.

(1) Where a state court has entered a final judgment dismissing an FELA plaintiff's action for *forum non conveniens* what effect must a United States District Court (sitting in the same city) give that judgment upon a motion to transfer an identical action subsequently brought?

(2) Does mandamus lie to protect a party's right not to have to relitigate an issue conclusively determined between the parties in a prior action?

(3) Alternatively, does mandamus lie to correct Petitioner's abuse of discretion in failing to transfer a case which had previously been dismissed for *forum non conveniens* by a state court sitting in the same city?

STATEMENT OF THE CASE.

Because in Respondent's judgment Petitioner's brief is incomplete and distorts the case in what is presented, a restatement of the case is desirable.

In 1961, Jack J. Filbrun, a resident of Ludington, Michigan, filed an FELA action in the Circuit Court of Cook County, Illinois against the Respondent seeking damages for personal injury from an accident which occurred in Ludington, Michigan (R. 6-8). Respondent promptly moved for dismissal on the grounds of *forum non conveniens.* The motion was granted (R. 10-20, 27). A petition for rehearing was denied (R. 30-34, 35). No appeal was taken (R. 85).

Instead Filbrun filed the same action in the United States District Court for the Northern District of Illinois sitting but a few city blocks from the courthouse for the Circuit Court (R. 36-40). Respondent moved under 28 U.S.C. §1404(a) to transfer the case to the United States District Court for the Western District of Michigan, Southern Division, in Grand Rapids, Michigan, on the ground, among others, that the final judgment of the Circuit Court of Cook County required such transfer (R. 41-53). Petitioner denied Respondent's motion (R. 60). A petition for rehearing (R. 61-62) received the same fate (R. 63).

Respondent then sued out an original petition for writ of mandamus in the United States Court of Appeals for the Seventh Circuit praying that Petitioner be compelled to transfer Filbrun's action (R. 1-5). On June 27, 1962, that Court entered an order denying the petition (R. 83). Thereafter, on rehearing, this order was vacated and set aside and an order entered directing that a writ of mandamus issue as prayed by Respondent (R. 9-92).

The Court of Appeals, with one judge dissenting, held that the principles of *res judicata* ("estoppel by verdict"), as implemented by the full faith and credit statute, 28 U.S.C. §1738, required this result (R. 84-87).

SUMMARY OF ARGUMENT.

I. Filbrun first chose to bring suit in the Circuit Court of Cook County. That Court entered a final, appealable order dismissing his action on the grounds of *forum non conveniens*. Under Illinois law this dismissal was a finding that Cook County was an inconvenient forum and that Filbrun was motivated purely by vexation and harassment. The state court, in reaching this conclusion, was required to pass upon each point and question required to be considered upon a motion to transfer, and more. Accordingly this judgment was *res judicata* on all issues raised by Respondent's motion to transfer Filbrun's action under §1404(a). Common law principles of *res judicata* estopped Filbrun from relitigating the issues which were conclusively determined against him by the state court. Therefore, Petitioner was required to give effect to the final judgment of the state court by transferring Filbrun's action to a more convenient and appropriate forum.

II. The full faith and credit statute required Petitioner to give the same effect to the final judgment of the state court as would another state court sitting in Cook County. Under Illinois law of *res judicata* ("estoppel by verdict") any other Illinois state court sitting in Cook County would have dismissed Filbrun's subsequent action on the basis of the judgment of the Circuit Court. When confronted with Respondent's motion, Petitioner was required to give the judgment of the Circuit Court the same respect as would an Illinois Court.

III. Alternatively, Petitioner grossly abused his discretion in failing to transfer Filbrun's action to a more appropriate and convenient forum. The convenience of the parties, the convenience of the witnesses, and the interest of justice, when considered in light of the fact that the Circuit Court of Cook County had previously dismissed the same action between the same parties for *forum non conveniens*, all combined to require transfer. Coupling this with the fact that failure to transfer would foreclose Respondent from presenting the testimony in person of the seven doctors who examined and treated Filbrun immediately following his accident, it is clear that Petitioner grossly abused his discretion.

IV. There is no question that the Court of Appeals had the power to issue its writ of mandamus. The issue is whether the facts and circumstances of this particular case warranted the exercise of this extraordinary remedy. There is no division in the Federal courts that mandamus lies to protect a party's right not to have to relitigate issues conclusively determined in another court. In this instance the writ lies to protect a right essential to the working of the judicial process just as it also lies to protect the right to jury trial, the right to trial by judge instead of master, and the right not to be subjected to gross abuses of judicial power.

Alternatively, mandamus was the appropriate remedy to correct Petitioner's gross abuse of discretion. Although there is a difference in emphasis in the Courts of Appeals as to the circumstances which must be present in a §1404(a) case before mandamus will issue, there is no question of the power to issue the writ in a proper case. Petitioner's failure to give any effect to the state court order, coupled with the inconvenience to the parties and witnesses and the injustice of trial in a forum sitting in Cook County, constituted such a denial of the rights of Respondent as to warrant correction by mandamus.

ARGUMENT.

I. THE FINAL JUDGMENT OF THE STATE COURT REQUIRED TRANSFER OF FILBRUN'S ACTION UNDER COMMON LAW PRINCIPLES OF RES JUDICATA.

The Circuit Court of Cook County, where Filbrun first filed suit, after consideration of detailed affidavits, counter-affidavits, written briefs, arguments and re-arguments, entered an order dismissing Filbrun's action for *forum non conveniens*. This was a final, appealable order. ILL. REV. STAT. ch. 110, §77 (1961); *Gaddis* v. *Nash*, 304 Ill. App. 259, 26 N.E. 2d 139 (1st Dist. 1940) (Abst.); *Jiffy Lubricator Co.* v. *Stewart-Warner Corp.*, 177 F. 2d 360, 362 (4th Cir. 1949) (". . . a dismissal [for *forum non conveniens*] . . . puts an end to the action and hence is final and appealable.").

Filbrun did not directly attack that judgment by appeal. Instead he chose to collaterally attack that judgment by instituting suit in the United States District Court for the Northern District of Illinois. The Court of Appeals held, in effect, that Filbrun was bound by the state court's final judgment that he could not litigate his action in Cook County, and therefore Petitioner was required to transfer the case upon Respondent's motion.

This decision is clearly correct. All issues required to be considered by Petitioner in passing on Respondent's motion had already been found against Filbrun by the state court. If Filbrun wanted to contest the correctness of the state court's final judgment his only remedy was appeal. Filbrun wanted ". . . an encore" [*Angel* v. *Bullington*, 330 U.S. 183, 191 (1947)] and Petitioner gave it to him. The Court of Appeals correctly held he was not entitled to one.

Res judicata literally means "matter adjudged". In the terminology of the RESTATEMENT OF JUDGMENTS §45, *comment d*, the branch of *res judicata* which is involved in this case is called "direct estoppel". The RESTATEMENT is clear and concise on this point:

> "Direct estoppel. Where an issue is actually litigated and determined in an action, the determination is conclusive in any subsequent action between the parties based upon the same cause of action. Ordinarily, after a judgment is rendered in an action, the cause of action is extinguished by the judgment, and it is immaterial what issues were actually litigated. Where, however, a judgment for the defendant is not upon the merits, the plaintiff is not precluded from maintaining an action on the same cause of action; but in such a case *the matter actually litigated and determined in the action is res judicata, and is binding upon the parties in a subsequent action based upon the same cause of action* (see §49, Comment b). The term 'direct estoppel' is used in the Restatement of this Subject to indicate that the binding effect of a judgment as to matters actually litigated and determined in one action applies to a subsequent action between the parties based upon the same cause of action, where the plaintiff is not precluded from maintaining such an action by the extinguishment of his cause of action under the rules as to merger and bar." RESTATEMENT OF JUDGMENTS §45, *comment d* (1942) (emphasis added). See also RESTATEMENT OF JUDGMENTS §49, *comment b*.

The matter ". . . actually litigated and determined" in the state court action was whether Filbrun should be allowed to litigate his cause of action in a Cook County forum. The state court conclusively held that he should not be allowed to do so. That final judgment should preclude subsequent trial of the same cause of action in the United States District Court sitting within a few blocks of the state forum.

Petitioner argues that the judgment of the state court was not final because it was "a mere judgment of dismissal" (Brief, p. 10) and not a determination on the merits. Petitioner's position is not supported by any authority. Indeed the authorities are unanimously against this unusual contention:

> "A judgment may be final although it does not finally determine the controversy between the parties with reference to the subject matter. Thus, a judgment for the defendant may be a final judgment, although it is not a judgment on the merits and does not preclude the plaintiff from maintaining a second action against the defendant on the same cause of action." RESTATEMENT OF JUDGMENTS §41, *comment b* (1942).
>
> ". . . [T]o borrow Mr. Justice Brandeis' famous phrase, 'final' also is 'a word of many meanings'; the law of judgments does *not* use it in relation to conclusiveness . . . to mean only a judgment 'which ends the litigation . . . and leaves nothing for the court to do but execute the judgment' . . ." *Lummus Co.* v. *Commonwealth Oil Refining Co.*, 297 F. 2d 80, 89 (2d Cir. 1961), *cert. denied*, 368 U.S. 986 (1962) (Friendly, J.) (emphasis added).

The real issue in this case, and one which Petitioner unfortunately largely ignores, is whether the judgment of the state court was determinative of the "key ingredient" [*Partmar Corp.* v. *Paramount Pictures Theatres Corp.*, 347 U.S. 89, 100 (1954)] involved in the motion to transfer. Respondent submits that the judgment clearly was so determinative. In analyzing this issue cases involving "collateral estoppel by judgment" (different cause of action) are equally as helpful as "direct estoppel" cases (same cause of action) and indeed the Illinois state courts and

the United States Courts of Appeals often use the term "estoppel by verdict" or "collateral estoppel" to cover both situations. *Clarke Baridon, Inc.* v. *Merritt-Chapman & Scott Corp.*, 311 F.2d 389, 396 (4th Cir. 1962); *Rose* v. *Dolejs*, 7 Ill. App. 2d 267, 275, 129 N.E. 2d 281, 285 (2d Dist. 1955). In each situation the rule is the same that only those matters directly placed in issue by the parties and actually decided by the court in the former litigation are binding between the same parties in subsequent litigation whether in the same cause of action (as here) or in a different cause of action. *Cromwell* v. *County of Sac*, 94 U.S. 351 (1876); Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1, 3 (1942) (". . . matters actually litigated and determined in the prior action cannot be relitigated in the later action.") An Illinois court has approved the following method of determining what has actually been decided in the prior action:

> ". . . [W]hen a matter, usually of fact but sometimes of law, is once decided between the parties . . . that determination is binding in a subsequent suit where that particular matter is again in issue between the same parties, even though the cause of action is not the same. 'Here we find the courts limiting the rule most scrupulously to what was in fact litigated and decided in the former proceeding, and for that purpose referring to pleadings, testimony, jury instructions, finding, verdicts and any other pertinent source of information sensibly helpful to the inquiry. Unless it does affirmatively appear that the matter was actually raised and passed upon, then it may be litigated in the case now on trial. The inquiry is factual and common-sense. The might-have-beens are left strictly out of the picture.' Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339, 342 (1948)." *Cohen* v. *Schlossberg*, 17 Ill. App. 2d 320, 330, 150 N.E. 2d 218, 223 (1st Dist. 1958).

Taking this approach to determine the "matters actually litigated and determined" in the state court, a study of the record shows that almost identical affidavits were presented to Petitioner as had been presented to the state court (Compare R. 47-53 and 54-59 with R. 14-20, 25-26, and 31-33); almost identical motions were presented (Compare R. 43-47 with R. 10-14); and in addition the state court had Filbrun's answer to the motion to dismiss. (R. 21-24). These pleadings and documents frame the factual issues determined by the state court in reaching its ultimate conclusion that Filbrun's action should be dismissed for *forum non conveniens*. Under Illinois law it is clear that the state court was required to, and did, consider and adjudicate every point and question necessary to be passed upon in connection with a §1404(a) motion to transfer. *Cotton* v. *Louisville & Nashville R. R.*, 14 Ill. 2d 144, 174, 152 N.E. 2d 385 (1958). Indeed that case makes it apparent that the standards of decision applied by the state court in dismissing for *forum non conveniens* include all of the standards imposed upon Petitioner for determination of the motion to transfer under 28 U.S.C. §1404(a) and more. Compare, *Cotton* v. *Louisville & Nashville R.R.*, 14 Ill. 2d 144, 174, 152 N.E. 2d 385 (1958) (holding, even though the factors of inconvenience are present, that only when it is shown that plaintiff is motivated by vexation and harassment will an FELA case be dismissed), with *Norwood* v. *Kirkpatrick*, 349 U.S. 29, 32 (1955), where it was said:

> "When Congress adopted §1404(a), it intended to do more than just codify the existing law on *forum non conveniens* . . . The harshest result of the application of the old doctrine of *forum non conveniens*, dismissal of the action, was eliminated . . . As a consequence, we believe that Congress, by the term 'for the convenience of parties and witnesses, in the interest of justice,' intended to permit courts to grant transfers upon a lesser showing of inconvenience. This

is not to say that the relevant factors have changed or that the plaintiff's choice of forum is not to be considered, but only that the discretion to be exercised is broader." Accord, *Grubs* v. *Consolidated Freightways, Inc.*, 189 F. Supp. 404, 407 (D. Mont. 1960).

Therefore, the Circuit Court of Cook County, in dismissing this action on the grounds of *forum non conveniens*, considered and decided every point and question which was required to be considered by Petitioner in passing on Respondent's motion to transfer. It was improper for Petitioner to allow Filbrun to relitigate the very issues which had been determined against him in a final judgment entered by the state court. RESTATEMENT OF JUDGMENTS §45. *comment d;* §49, *comment b* (1942). The issues adjudicated by the state court, whether rightly decided or not, were required to be taken as conclusively established. *Chicago, Rock Island & Pacific R.R.* v. *Schendel*, 270 U.S. 611, 617 (1926).

In *Chicago, Rock Island & Pacific R.R.* v. *Schendel*, 270 U.S. 611 (1926), a man named Hope was killed in an accident on the line of the railroad in Iowa. Hope's administrator filed an FELA action in a Minnesota state court on February 21, 1923, alleging that Hope was engaged in interstate commerce. On March 2, 1923, the railroad instituted proceedings before the Iowa Industrial Comission alleging that Hope was engaged in intrastate commerce. The Commission so held and Hope's widow appealed to the Iowa County Court which affirmed the holding that Hope was engaged in intrastate commerce.

Later, the FELA action was heard in the Minnesota state court. That court held that the Iowa court's determination that Hope was engaged in intrastate commerce was not binding, found he was in interstate commerce, and entered judgment against the railroad. The Minnesota

Supreme Court affirmed. On appeal to this Court, the action of the Minnesota Supreme Court was reversed. This Court said:

> "The Iowa court, under the compensation law, in the due exercise of its jurisdiction, having adjudicated the character of the commerce in which the deceased was engaged, that matter, whether rightly decided or not, must be taken as conclusively established, so long as the judgment remains unmodified . . . . [T]he judgment upon the point was nonetheless conclusive as *res judicata* because it was rendered under the state compensation law, while the action in which it was pleaded arose under the federal liability law . . . ." 270 U.S. at 617.

Likewise, in the case at bar, the fact that the Illinois state court determined that a Cook County, Illinois forum was an inconvenient and inappropriate place for the trial of this action under the doctrine of *forum non conveniens,* would not make that judgment any less conclusive as *res judicata* in the determination that this action should be transferred pursuant to §1404(a).

The dissenting opinion in the Court of Appeals is predicated on the thesis that the material factual issues determined by the Circuit Court of Cook County were not the same as the factual issues presented to the District Court, in that the state court could consider the availability of a state forum in Ludington, Michigan, whereas the District Court could only consider the availability of the United States District Court sitting in Grand Rapids, Michigan. Following the logic of the dissent, it would follow that if Filbrun lived in Grand Rapids and, instead of falling off a box car in Ludington, had been injured at Grand Rapids, the material factual issues would have been identical and Petitioner would have been required to

transfer this action. The happenstance of residence and accident in a city other than Grand Rapids is not a sufficient factor upon which to predicate a judicial determination that the final judgment of the state court be held for naught.

Ludington, Michigan lies within the Western District of Michigan, Southern Division. 28 U.S.C. §102(b) (1). The fact that the United States District Court for that district normally holds Court at Grand Rapids, Kalamazoo, and Lansing, would not necessarily preclude the holding of court by special term at Ludington. 28 U.S.C. §141 provides that special terms of district court may be held at such place in the district as the nature of the business may require. *United States* v. *Tomaiolo*, 249 F.2d 683 (2d Cir. 1957). Of course 28 U.S.C. §142 provides that court shall be held at places where Federal quarters and accommodations are available or suitable quarters or accommodations are furnished without cost to the United States. Ludington may or may not have such facilities. But that is not the point. The point is that the United States District Court for the Western District of Michigan, Southern Division is not a "Grand Rapids forum". Rather it is a court for the entire district and division. 28 U.S.C. §132(a) ("There shall be in each judicial district a district court which shall be a court of record known as the United States District Court for the district.") Therefore, it is not a fair distinction to say that Petitioner could only consider the availability of a "Grand Rapids forum." Ludington is as much a part of the "forum" to which transfer was sought as is Grand Rapids.

There is an additional reason why the availability of a forum in Ludington, Michigan was not a factual difference in the case before the District Court as compared with the case before the state court. Actually, a state court forum

at Ludington was just as available to Filbrun after he filed his action in the District Court as before. If Petitioner had granted Respondent's motion to transfer Filbrun's action to the United States District Court for the Western District of Michigan, Southern Division, Filbrun could, at that time, have voluntarily dismissed his action in the District Court and proceeded anew in the state court sitting in Ludington.[1] FED. R. CIV. P. 41(a)(1); *Benton* v. *Vinson*, 255 F. 2d 299 (2d Cir.), *cert. denied*, 358 U.S. 885 (1958).

Petitioner states that he gave "respectful consideration" to the judgment of the state court, yet Petitioner, in the Court of Appeals, sought affirmance of his denial of transfer as though that order never existed. In fact Petitioner gave no effect whatsoever to the final judgment of the state court. The Court of Appeals corrected this misdeed. This Court should affirm.

II. THE FULL FAITH AND CREDIT STATUTE REQUIRED TRANSFER OF THE ACTION.

The judicial proceedings of any court of any state ". . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such state . . . from which they are taken."

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[1] This election would not have been available to Filbrun after the three year statute of limitations had expired. However, in this case the statute of limitations will not expire until July 15, 1963, and Petitioner's motion to transfer was presented August 23, 1961 (R. 41) and denied on Dec. 7, 1961 (R. 60).

Also the election would probably not have been available as of right after Petitioner filed its answer on January 10, 1962 but again this was done after the motion to transfer had been denied. (R. 68). *Larsen* v. *Switzer*, 183 F.2d 850 (8th Cir.), *cert. denied*, 340 U.S. 911 (1950).

28 U.S.C. §1738. Congress, through this section, has imposed on Federal courts the same duty to give full faith and credit to judgments of state courts as is imposed upon state courts by Article IV, Section 1 of the United States Constitution. *Wayside Transportation Co.* v. *Marcell's Motor Express, Inc.*, 284 F. 2d 868, 870-71 (1st Cir. 1960). That case held that a Vermont state court determination concerning jurisdiction over the defendant was binding and could not be relitigated in a United States District Court sitting in Massachusetts. The Court said:

> "Due process does not give parties the right to litigate the same question twice. *Chicago Life Insurance Company* v. *Cherry*, 1917, 244 U.S. 25, 37 S. Ct. 492, 61 L. Ed. 966. The constitutional and statutory provisions requiring full faith and credit articulate and implement the dictate of public policy 'that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be considered forever settled as between the parties.' *Baldwin* v. *Iowa State Traveling Men's Association*, 1931, 283 U.S. 522, 51 S. Ct. 517, 518, 75 L. Ed. 1244." 284 F. 2d at 871.

A. An Illinois Court Would Have Dismissed The Action.

It is clear from decisions of the Illinois Supreme Court and Appellate Courts that if Filbrun, instead of filing his action in the United States District Court for the Northern District of Illinois subsequent to its dismissal by the Circuit Court of Cook County, had filed the same action in another state court sitting in Cook County, Illinois, his action would have been dismissed because of the conclusive determination of the Circuit Court that Cook County, Illinois was an inconvenient and inappropriate forum. In *Healea* v. *Verne*, 343 Ill. 325, 331-32, 175 N.E. 562, 565 (1931), it was said:

> ". . . [E]stoppel by verdict . . . arises when a particular material fact in any litigation has been determined in a former litigation between the same parties

> . . . in which that fact was also material to the issue. In such case the decision of the question in the former litigation is conclusive upon the parties in the latter . . . and that question cannot be litigated again between the parties in that case . . . in any subsequent action in the same court *or any other court*, whether the question arises upon the same or a different cause of action, whatever may have been the nature or purpose of the action in which the judgment was rendered or of that in which the estoppel is set up." (emphasis added)

The term "estoppel by verdict" used by Illinois courts ". . . is but another branch of the doctrine of *res judicata*," and it rests upon the same principle of law; that is, that a matter once litigated between parties to a final judgment in a court of competent jurisdiction cannot again be controverted." *Chicago Title & Trust Co.* v. *National Storage Co.*, 260 Ill. 485, 493, 103 N.E. 227, 231 (1913). *E.g.*, *Hicks* v. *Hicks*, 20 Ill. App. 2d 139, 155 N.E. 2d 355 (1959).

Accord, *Rose* v. *Dolejs*, 7 Ill. App. 2d 267, 275, 129 N.E. 2d 281, 285 (2d Dist. 1955) where it was said:

> "When some specific fact or question has been actually and directly in issue and has been adjudicated and determined by a court of competent jurisdiction in a former suit, and the same fact or question is again put in issue in a subsequent suit between parties or their privities who were parties in the former suit, its determination in the former suit, if properly presented and relied upon, is conclusive upon the parties and persons in privity with them in the latter suit, without regard to whether or not the cause of action is the same in both suits, and it cannot be again litigated in the subsequent suit upon the same or a different cause of action whatever may have been the nature of the first action or of the second action in which the estoppel is set up: *Hoffman* v. *Hoffman*, 1927, 246 Ill. App. 60. It is of first importance both in the observance

> of private rights and of the public good that a question once adjudicated by a court of competent jurisdiction shall be considered as finally settled and conclusive on the parties: *Winkelman* v. *Winkelman*, 1924, 310 Ill. 568, 142 N.E 173. Where the cause of action in the first suit is not the same as the cause of action in the second suit the court's determination in the first suit on all questions actually decided is final and estops the parties and their privities from relitigating those questions in the second suit,—such is normally denominated as estoppel by verdict or judgment, and is but another branch of the doctrine of *res judicata*, and rests on the same principles as *res judicata*: *City of Elmhurst* v. *Kegerreis*, 1945, 392 Ill. 195, 64 N.E. 2d 450."

Petitioner has never seriously contended that an Illinois court would not have dismissed Filbrun's action on the basis of the Circuit Court's judgment. (Petition for Writ of Certiorari, p. 11-12)

The remaining question is what effect does this fact have on the District Court.

B. The Final Judgment Of The State Court Should Have Been Given Effect By Transfer.

It might be argued that full faith and credit could only have been afforded the state court's final judgment by an order of dismissal in the Federal Court. In the first opinion of the Court of Appeals (R. 80), now withdrawn, this was thought by one judge to defeat Respondent's claim. Reflection and reason show that this cannot be so.

Prior to the adoption of §1404(a), which became effective September 1, 1948, the common law doctrine of *forum non conveniens* was available in federal courts in most actions. E.g., *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947). However, the availability of *forum non conveniens* in FELA

actions in federal courts was in considerable doubt because of language in *Baltimore & Ohio R. R.* v. *Kepner*, 314 U.S. 44 (1941) and the same was true in state courts, *Miles* v. *Illinois Central R. R.*, 315 U.S. 698 (1942).

With the advent of §1404(a), even in those types of actions where the common law doctrine was formerly available, the courts have uniformly held that §1404(a) occupies the field and that dismissal under common law *forum non conveniens* is no longer available. E.g., *Collins* v. *American Automobile Ins. Co. of St. Louis*, 230 F.2d 416, 418 (2d Cir.), *cert. dismissed*, 352 U.S. 802 (1956), where it was said:

> "The application of the doctrine of *forum non conveniens* by Judge Palmieri to dismiss the case was erroneous. The field of that doctrine is entirely occupied by 28 U.S.C. §1404(a), enacted in 1948 subsequent to the decision of *Gulf Oil Corp.* v. *Gilbert*, *supra*, 330 U.S. 501, 67 S. Ct. 839—the case relied upon by the judge. See *Norwood* v. *Kirkpatrick*, 349 U.S. 29, 32, 75 S. Ct. 944, 93 L.Ed. 789 (a case decided after the decision herein); *Ex parte Collett*, 337 U.S. 55, 69 S. Ct. 944, 93 L.Ed. 1207, 10 A.L.R.2d 921. If the forum is found to be inconvenient, the remedy now is transfer, not dismissal as formerly."

Accord, *Burges* v. *Proctor & Gamble Defense Corp.*, 172 F.2d 541 (5th Cir. 1949); *Harrison* v. *United Fruit Co.*, 141 F.Supp. 35, 36 (S.D.N.Y. 1956) (dictum).

The conclusiveness of the Circuit Court's judgment should not be held for naught merely because Congress, by enacting §1404(a), chose to eliminate some of the harsh effects of the common law doctrine of *forum non conveniens*. Full Faith and Credit is asked for that part of the state court judgment implicit in its order of dismissal which requires transfer under §1404(a), *i.e.*, that trial in

the local forum is not for the convenience of the parties, or of the witnesses, nor in the interest of justice. Once full faith and credit is given to the facts found, and legal conclusions determined by the state court, the appropriate remedy must follow as a matter of course, in this instance, transfer.

III. ALTERNATIVELY, THE JUDGMENT OF THE COURT OF APPEALS THAT PETITIONER ABUSED HIS DISCRETION IS CORRECT.

Contrary to Petitioner's claim on page 5 of his brief, the Court below relied in part upon the gross abuse of discretion of Petitioner, in ordering the writ of mandamus to issue. The last paragraph of the majority opinion (R. 87) carries a clear alternative holding that Petitioner did not do justice in failing to transfer this case to the district court sixty miles from Filbrun's home and the place of his accident.

From the affidavits and documents filed by both parties Petitioner had before him the following facts when he considered Respondent's motion to transfer.

1. Filbrun is a resident of Ludington, Michigan, which is approximately 300 miles from Chicago, Illinois, and approximately 60 miles from Grand Rapids, Michigan.

2. The accident of which Filbrun complains occurred in Ludington, Michigan.

3. The seven doctors and chiropractors who examined and treated Filbrun at the time of his alleged injury, and immediately thereafter, all reside in Michigan.

4. A Dr. Rabin, who did not examine or treat Filbrun until after he had retained his present Chicago attorneys to represent him, is the only witness, medical or otherwise, who does not reside in Michigan.

5. Three of the four occurrence witnesses and two railroad employees who inspected the boxcar from which Filbrun fell, all reside in Ludington, Michigan.

6. Seven of the eight medical witnesses would not be available to testify personally in Chicago, Illinois.

7. The Circuit Court of Cook County, Illinois had previously dismissed the same case between the same parties on the ground that that forum was an inconvenient and inappropriate place for the trial of this action.

A. The Convenience Of The Parties.

The material before Petitioner showed beyond doubt that the convenience of the Respondent would best be served by trial of the case in Grand Rapids, Michigan. And, since Filbrun's residence is near Grand Rapids, Michigan, there was no doubt that the first test, *i.e.*, convenience of the parties, should have been decided in favor of Respondent. *Patterson* v. *Louisville & Nashville R. R.*, 182 F. Supp. 95, 98 (S.D. Ind. 1960).

B. Convenience Of The Witnesses.

All but one of the thirteen witnesses who will testify in this case, should it be held at Grand Rapids, Michigan, reside in and around Grand Rapids. There was no showing by Filbrun that the thirteenth witness, the one who lives in Chicago, Illinois, would be unable to personally testify upon trial in Grand Rapids. In sharp contrast, the affidavit filed by the Respondent in support of its motion to transfer showed that seven of the thirteen witnesses would not be able to testify upon trial of the case in Chicago.

For these reasons Petitioner should have decided the second test, *i.e.*, convenience of the witnesses, in favor of Respondent. The only person who might be incon-

venienced by trial in Grand Rapids is Filbrun's Chicago counsel ". . . and that is not a controlling factor." *Sypert* v. *Miner*, 266 F.2d 196, 199 (7th Cir.), *cert. denied*, 361 U.S. 832 (1959).

C. The Interest Of Justice.

Petitioner should have given this test paramount consideration. Both the interests of the parties to the lawsuit, as well as society in general, should have been considered.

> "Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation has piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. . . . There is a local interest in having localized controversies decided at home." *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 509 (1947).

Other factors include the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling witnesses, and the cost of obtaining attendance of willing witnesses; the possibility of a view of the premises; and the congestion of the court calendar in the district where the case is pending compared to the calendar in the district to which it is sought to have the case transferred. *Chicago, Rock Island & Pacific R.R.* v. *Igoe*, 220 F.2d 299, 304 (7th Cir.), *cert. denied*, 350 U.S. 822 (1955).

The greatest injustice resulting from Petitioner's ruling was to foreclose Respondent from presenting the testimony in person of the seven doctors who examined and treated Filbrun immediately following his accident in July, 1960. This evidence is vital to Respondent and the subpoena powers of the United States District Court for the Northern

District of Illinois cannot be utilized to compel the attendance of those doctors in a Chicago forum. This obvious injustice should have been corrected by granting the motion to transfer. Petitioner's failure to do so was a gross abuse of discretion particularly when coupled with the finding of the state court that Filbrun was motivated purely by vexation and harassment in suing Respondent in a Cook County Court. The Court of Appeals properly corrected Petitioner's gross abuse of discretion by mandamus.

IV. MANDAMUS WAS AN APPROPRIATE REMEDY.

The availability of mandamus as a matter of jurisdiction is not in dispute. 28 U.S.C. §1651(a). In proper cases, this Court more than once has upheld the use of mandamus as an appropriate remedy. *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249 (1957); *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (1962); *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959).

As stated in *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943), the traditional use of the writ "... has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." Each case must be decided on the basis of whether or not the circumstances of that case make mandamus an appropriate remedy. The common thread which runs through the numerous cases in this Court which have sustained the issuance of the writ is that it will lie when rights essential to the working of the judicial process are threatened by an inferior court. Thus improper denial of the right to trial by jury is subject to the protection of mandamus, *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (1962) and *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, 511 (1959); the right to trial by judge rather than by master is protected, *Los Angeles*

Brush Mfg. Corp. v. *James*, 272 U.S. 701 (1927) and *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249 (1957); clear abuse of discretion or usurpation of judicial power is prevented by the writ, c.f., *De Beers Consolidated Mines* v. *United States*, 325 U.S. 212, 217 (1945); and clear mistake of law is subject to correction by the writ, *Barrack* v. *Van Dusen*, 309 F.2d 953 (3d Cir. 1962) *petition for cert. filed* February 21, 1963 (No. 851).

When all is said and done mandamus is the appropriate ". . . remedy to oblige inferior courts to do that justice which they are in duty . . . bound to do . . ." *Virginia* v. *Rives*, 100 U.S. 313, 323 (1879).

The issuance of the writ here has two sources in the record for its justification; first, mandamus lies to prevent a district court from compelling a litigant to relitigate an issue previously determined between the parties in a state court having jurisdiction of the subject matter and of the parties; second, mandamus lies to correct a gross abuse of discretion in deciding an issue raised under §1404(a).

A. Respondent's Right Not To Have To Relitigate Issues Conclusively Determined By The State Court Was Entitled To The Extraordinary Protection of Mandamus.

As to the use of mandamus to prevent relitigation of an issue once decided, there is no challenge to the availability of the remedy in proper cases. *Lummus Co.* v. *Commonwealth Oil Refining Co.*, 297 F.2d 80, 86-87 (2d Cir. 1961) (Friendly, J.), *cert. denied*, 368 U.S. 986 (1962). In that case Lummus sought mandamus to prevent the district judge from re-examining an issue that had been conclusively determined in favor of Lummus by another court.

The Second Circuit held that mandamus was an appropriate remedy saying:

> "The right not to have to relitigate an issue so determined is as much entitled to extraordinary protection as the right to jury trial, [cases omitted] the right to trial before an unbiased judge, [cases omitted] or the right to trial directly by a judge rather than initially by a master, *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249 (1957). Accordingly we think the case appropriate for mandamus . . . ." 297 F.2d at 87.

Mandamus is an extraordinary remedy reserved for really extraordinary cases. *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 25-26 (1943), establishes that the Court of Appeals had power to grant the writ. The question is ". . . whether in the light of all the circumstances the case was an appropriate one for the exercise of that power." Respondent submits that the answer to that question is "yes" and therefore the decision of the Court below should be affirmed.

B. Alternatively, Mandamus Was An Appropriate Remedy To Correct Petitioner's Gross Abuse Of Discretion.

There appears to be a difference in emphasis in the Courts of Appeal as to the circumstances which must be present in a §1404(a) abuse of discretion case before mandamus will issue. Compare *Chicago, Rock Island & Pacific R.R.* v. *Igoe*, 212 F.2d 378 (7th Cir. 1954), *same case*, 220 F.2d 299 (7th Cir.), *cert. denied*, 350 U.S. 822 (1955) (mandamus lies to test a clear case of abuse of discretion in deciding a §1404(a) motion), with *Great Northern R.R.* v. *Hyde*, 238 F. 2d 852 (8th Cir., 1956), *aff'd on rehearing*, 245 F. 2d 537 (8th Cir.), *cert. denied*, 355 U.S. 872 (1957) (writ of mandamus denied to prevent implementation of a transfer order under §1404(a) on ground issuance of writ

would be an "erroneous exercise of discretion".). See also 1 MOORE'S FEDERAL PRACTICE, par. 0.147 n. 25, at p. 1966 (2d ed. 1961).

Although the availability of mandamus to correct a clear abuse of discretion in deciding a §1404(a) motion was a question not reached by this Court in *Norwood* v. *Kirkpatrick*, 349 U.S. 29 (1955), the majority considered the merits of the controversy in affirming the Third Circuit's refusal to issue a writ of mandamus and the dissent (three Justices) would have reversed on the merits. It is apparent that the issue is not *whether* mandamus lies to correct an abuse of discretion in deciding a transfer motion but *when* it lies.

The undesirability of piecemeal appeals is most often urged as a reason for denying the use of mandamus as an appropriate remedy in this situation. This, it is claimed, is an undue burden on judicial administration as well as upon the parties. Such an argument is without merit here. Were Respondent to be put to a trial on the merits, the inconvenience and injustice of which it complains would be expended prior to the time it could seek redress in a reviewing court. The consequent burden upon the parties and the judicial system would be far greater. The more sound rule would leave mandamus available and the use thereof left to those extraordinary cases which find favor upon presentation of a proper petition for leave to file a petition for a writ.

"It is submitted that the Court below in ordering the writ of mandamus to issue had ample support for use of the remedy in the failure of Petitioner to give any effect whatsoever to the final judgment of the state court, coupled with the substantive factors of inconvenience to the parties and to the witnesses, with the attendant injustice therefrom flowing.

* * *

Filbrun[2] asks this Court to establish a rule of law which would allow an FELA plaintiff multiple opportunities to contest the appropriateness of judicial forums far distant from his home and place of accident. Ignoring, or misstating, the principles of finality, public policy and repose which underlie *res judicata*, Filbrun seeks reversal of an undeniably correct decision for little reason other than that he is an FELA plaintiff. Filbrun had his day in court as to the appropriateness and convenience of a Cook County forum. The United States Court of Appeals correctly concluded that for Filbrun, like all other litigants, that was enough. This Court should affirm.

CONCLUSION.

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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[2] Although Petitioner is a Judge of the United States District Court, the real party in interest is Filbrun, whose counsel represents the Judge in this action.

APPENDIX

FED. R. CIV. P. 41 (a)(1)

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal: Effect Thereof

(1) *By Plaintiff; by Stipulation.* Subject to the provisions of Rule 23 (c), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

28 U.S.C. §102 (b)(1)

§ 102. Michigan

Michigan is divided into two judicial districts to be known as the Eastern and Western Districts of Michigan.

• • •

Western District

(b) The Western District comprises two divisions.

(1) The Southern Division comprises the counties of Allegan, Antrim, Barry, Benzie, Berrien, Branch, Calhoun, Cass, Charlevoix, Clinton, Eaton, Emmet, Grand, Traverse, Hillsdale, Ingham, Ionia, Kalamazoo, Kalkaska, Kent, Lake, Leelanau, Manistee, Ma-

son, Mecosta, Missaukee, Montcalm, Muskegon, Newaygo, Oceana, Osceola, Ottawa, Saint Joseph, Van Buren, and Wexford.

Court for the Southern Division shall be held at Grand Rapids, Kalamazoo, and Lansing.

28 U.S.C. §132 (a)

§ 132. Creation and composition of district courts

(a) There shall be in each judicial district a district court which shall be a court of record known as the United States District Court for the district.

28 U.S.C. §141

§ 141. Special terms; places; notice.

Special terms of district court may be held at such places in the district as the nature of the business may require, and upon such notice as the court orders, pursuant to rules approved by the judicial council of the circuit.

Any business may be transacted at a special term which might be transacted as a regular term.

28 U.S.C. §142

§ 142. Accommodations at places for holding court

Court shall be held only at places where Federal quarters and accommodations are available, or suitable quarters and accommodations are furnished without cost to the United States. The foregoing restrictions shall not, however, preclude the Administrator of General Services, at the request of the Director of the Administrative Office of the United States Courts, from providing such court quarters and accommodations as the Administrator determines can appropriately be made available at places where regular terms of court are authorized by law to be held,

but only if such court quarters and accommodations have been approved as necessary by the judicial council of the appropriate circuit.

28 U.S.C. §1445 (a)

§ 1445. Carriers; non-removable actions.

(a) A civil action in any State court against a railroad or its receivers or trustees, arising under sections 51-60 of Title 45, may not be removed to any district court of the United States.

28 U.S.C. §1651(a)

§1651 Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

ILL. REV. STAT. ch 110, §77 (1961):

Judgments, decrees and orders subject to review—Leave to appeal from an order granting a new trial.

(1) Appeals shall lie to the Appellate or Supreme Court, in cases in which any form of review may be allowed by law, to review the final judgments, orders or decrees of the circuit court, the superior court of Cook County, the county courts, the city courts and other courts whose judgments, orders and decrees are reviewable therein, under such limitations and conditions as may be imposed by law and subject to rules.

(2) An appeal may be taken from an order granting a new trial on leave granted by the reviewing court, or by a judge thereof in vacation, on notice to adverse parties and petition presented to the reviewing court within 30 days after the entry of the order or within any extended period granted upon notice

given and motion filed within the 30 days or any extensions thereof. Application for an extension of time shall be accompanied by such record and other documents as may be prescribed by rule. The ruling of the court upon a petition for leave to appeal from an order granting a new trial is not reviewable.

(3) Leave to appeal shall first be obtained only if expressly required by law. As amended by act approved July 19, 1955. L. 1955, p. 2238.